BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MYRTLE A. MCKINNEY Claimant	)	
VS.	)	Docket No. 1,014,863
CITY OF MANHATTAN Self-Insured Respondent	)	

ORDER

Claimant requested review of the May 5, 2005 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on August 9, 2005.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Kip A. Kubin of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant did not sustain her burden of proof that she suffered any permanent right knee impairment as a result of an incident at work on March 29, 2003. The ALJ concluded claimant injured her knee in an intervening accident at her home on June 9, 2003.

The claimant requests review of whether she suffered accidental injury to her right knee arising out of and in the course of her employment and, if so, the nature and extent of her disability. Claimant argues that her right knee remained symptomatic after her March 29, 2003 accident at work and that her knee gave out on her at her home on June 9, 2003, as a natural and probable consequence of her work-related accident.

Respondent argues the claimant did not sustain her burden of proof to establish she suffered injury or permanent impairment to her right knee as a result of the incident at work

on March 29, 2003. Respondent further argues there is no evidence of an impairment rating attributable to the March 29, 2003 incident at work nor any evidence the fall at home was a natural and probable consequence of the incident at work. Consequently, respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a technician for the City of Manhattan's Animal Shelter. On March 29, 2003, claimant was in the process of cleaning a kennel when a cat bit her on the right leg, above her ankle but somewhere below the knee. This caused her to fall to the floor. Claimant timely reported her accident, via e-mail, to Lynn Schumacher, her supervisor. Claimant's e-mail message did not include any specific reference to an injury to her knee nor did she request any treatment at that time.

Claimant testified her right knee began to swell and became painful after she got off work that day and by the next Sunday morning, it hurt to walk on it. When claimant returned to work the next week she was asked to fill out an accident report. This report of injury did not include any reference to pain in her knee. Claimant sought no treatment for her complaints nor did she specifically request treatment from her employer, although she testified she told her supervisor that her knee was hurting and she needed to get it checked out. But claimant's supervisor did not recall claimant complaining of knee pain.

Claimant continued to work at the animal shelter without incident until June 9, 2003. On that date, while at her home, claimant stepped off her deck and her right knee went backwards causing her to fall. She immediately sought treatment with her family physician, Dr. Jeff Atwood and she told him that she had stepped off her deck and injured her right knee.

Dr. Atwood referred claimant to an orthopaedist, Dr. Peter T. Hodges, who ultimately performed surgery on her knee in July 2003. The bills for this treatment were handled through her private insurance carrier. Since that time claimant has begun to complain of left leg and back pain, which she attributes to her work-related accident of March 29, 2003.

Claimant's supervisor, Ms. Schumacher, noted that after June 9, 2003, claimant returned from vacation and was noticeably limping. Ms. Schumacher noted she had not seen claimant limping before she left work for her vacation. Claimant told her supervisor that she had injured her knee stepping off some steps at her home.

In the middle of August 2003 claimant met with Marilyn Dickens, a human resources coordinator for respondent, who observed claimant was walking with a severe limp. Ms.

Dickens asked claimant what had happened and whether she had injured her knee at work. Claimant denied it was work related and recounted she injured her knee stepping off something at home. After the surgery claimant met with Mr. Larry Hackney, respondent's human resources specialist, and during a discussion on unrelated issues, he asked claimant if the knee injury and surgery was work related. The claimant told him it was not.

A preliminary hearing was held on this claim and the claimant had sought additional medical treatment for her knee and back complaints. The ALJ denied the request and determined any need for medical treatment was due to the intervening accident which occurred when claimant hyper-extended her knee at home. The Board affirmed that decision. The only additional evidence claimant presented at the regular hearing was the depositions of Drs. Hodges and Daniel D. Zimmerman. The ALJ noted that Dr. Hodges was unable to state whether there was any relationship between the condition he treated and the March 2003 accident. Dr. Zimmerman noted it would be arbitrary and not within a reasonable degree of medical probability to attempt to apportion his impairment rating between the alleged injury to the right knee in March 2003 and the intervening accident on June 9, 2003. And Dr. Zimmerman concluded any preexisting condition in the right knee was aggravated by the incident at her home. The respondent took the deposition of Dr. Michael J. Poppa who opined the Claimant suffered no impairment due to the March 2003 accident.

After reviewing all the evidence contained within the record, the Board finds no reason to disturb the ALJ's Award. Claimant admittedly suffered an accident at work on March 29, 2003, but she neither requested nor received any medical treatment following that accident. No physician recommended she have surgery following that accident nor are there any contemporaneous medical records nor accident reports that document her right knee complaints or swelling before the June 9, 2003 incident at claimant's home. Moreover, claimant initially denied her knee was injured at work and related her problems to the incident at her home. And claimant agreed that her knee condition was worsened by the incident at her home.

Claimant argues that her fall at home was a natural and probable consequence of her alleged right knee injury on March 29, 2003, while at work.

In general, the question of whether the worsening of claimant's alleged preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent fall at home aggravated, accelerated or intensified the underlying disease or affliction.[1]

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[1] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[2], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[3], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[4], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[5], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

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[2] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[3] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[4] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[5] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

Here, the Board finds this circumstance to be more akin to that found in *Stockman,* rather than *Gillig*. Claimant's right knee never required medical attention after the March 29, 2003 incident at work. Claimant continued working for several months and went on vacation. Her supervisor never observed claimant limping until after the fall at home. The evidence indicates that claimant's right knee condition, if injured at all on March 29, 2003, had completely resolved.

Finally, it should be noted that there is no evidence of permanent impairment attributable to the March 29, 2003 incident at work. Dr. Zimmerman provided an impairment rating based upon claimant's condition after her surgery. But the doctor noted he could not within reasonable medical probability apportion that rating between the March and June incidents.

The ALJ concluded claimant failed to meet her burden of proof that she suffered any permanent impairment as a result of the March 29, 2003 accident or that any current need for medical treatment was caused by that accident. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 5, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director